BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the Omaha	)	
Metropolitan Statistical Area	)	

OPPOSITION OF TIME WARNER TELECOM

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Time Warner Telecom, Inc. ("TWTC"), by its attorneys, hereby submits this Opposition to the Qwest Petition.[1]

I. INTRODUCTION AND SUMMARY

In its *Petition*, Qwest seeks sweeping relief from regulation in the Omaha, Nebraska MSA, including across-the-board forbearance (throughout the "telecommunications market") from all unbundling, interconnection, collocation, resale, and notice of interoperability change regulations as well as more generally from dominant carrier regulation and the incumbent LEC classification. But Qwest offers no basis, and there is none, for granting such relief.

Qwest simply ignores the presence of multiple product markets within the broader market for "telecommunications service" within Omaha. It relies on a purported demonstration of its non-dominance in the market for "local exchange services" as the basis for its request to be freed from regulation. But, even if it were appropriate to eliminate all regulatory constraints applicable to Qwest in the market for narrowband voice services or even "broadband" services

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[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Dkt. No. 04-223 (filed Jun. 21, 2004) ("*Petition*"). Qwest also filed an Affidavit accompanying its petition by David L. Teitzel, hereinafter referred to as "*Affidavit*."

demanded by residential/mass market customers (and it is not at all clear that it is), that fact offers no basis for reaching a similar conclusion with regard to the high-capacity DS1-level, DS3-level, Ethernet and other services demanded by most business customers. As the Commission held in the *Triennial Review Order*, customers that demand these more sophisticated and more expensive services do not view narrowband voice service or ADSL/cable modem mass market broadband as substitutes. The more sophisticated services demanded by most business customers therefore belong to *other product markets* and any market power Qwest may have lost in the narrowband market or the mass market broadband market *is irrelevant* to whether Qwest has somehow miraculously lost its market power in the business markets.

All incumbent LECs clearly have market power in the business markets, and Qwest does not even attempt to argue otherwise. As the Commission has repeatedly found, control over upstream inputs gives an incumbent LEC the incentive to raise its rivals' costs in the downstream markets in which competitors must rely on those inputs. In the *Triennial Review Order*, the Commission concluded that incumbent LECs control the only end user connections to the vast majority of commercial customer locations in the country and many of the interoffice transport routes in the country. Neither intermodal competitors such as Cox in Omaha nor conventional intramodal competitive LECs like McLeod and Alltel have or are likely to bypass the incumbents' loop facilities or overbuild the remaining transport routes any time soon.

In order for competition to be sustained for services outside the mass market (and possibly there as well), it is essential that Qwest be required to comply with the unbundling, collocation, interconnection and other statutory duties established by Congress to address their control over upstream inputs. There is therefore no basis from forbearing from these requirements or the incumbent LEC classification more generally in Omaha. Nor is there any

basis for reclassifying Qwest as nondominant in the business market since, as its recent proposed increase in interstate special access rates illustrates, what is left of dominant carrier special access regulation (the duty to file rates in public tariffs) is the only remaining regulatory constraint on its ability to unilaterally raise the prices paid by competitors like TWTC that acquire loops and transport from Qwest as special access. The Qwest *Petition* must therefore be denied.

II. DISCUSSION

In its *Petition*, Qwest argues that it is non-dominant in the market for "local exchange services" (*Petition* at 33) in the Omaha MSA and that it should therefore be freed, throughout the Omaha MSA, from all unbundling, interconnection, collocation, network notification and other regulation under Sections 251(c) and 271, from dominant carrier regulation (for example in the special access market) and from the incumbent LEC classification. Whatever the merits may be of this request with regard to narrowband and mass market broadband services (and they seem minimal), there is absolutely no basis for granting any forbearance from Qwest's legal duties to deal with competitors serving business customers. Qwest seems to have sought forbearance for all product markets in Omaha, including business markets, based on the view that, "it never hurts to ask." The *Petition* includes no evidence at all that Qwest has lost its control over bottleneck loops and transport that competitors need in order to serve business markets. In fact, Qwest has itself recently provided conclusive evidence that it retains that control by proposing unilateral rate increases (the *sine qua non* of market power) on a wide range of its special access service offerings, including increases of over 20 percent on rates for DS1 loops and transport (the types of transmission facilities that competitors are least likely to self-deploy).

The obvious deficiencies in the *Petition* begin with a failure to define the relevant markets appropriately. Before determining the extent of market power, and thus the extent to which forbearance is appropriate, the Commission must determine the relevant product and geographic markets.[2] Qwest's request for forbearance from regulation based on its purported non-dominance in the "local exchange services" market seems to assume that local phone service is in the same product market as high capacity special access loop and transport services. Qwest describes the relevant product "market" in the Omaha MSA as the "mass market residential services and business services, local exchange and exchange access services" provided by the competitors in the market. *Petition* at 6. In so doing, Qwest ignores critical differences in demand characteristics among residential/mass market, small/medium and large businesses. It also focuses its description of the services offered by competitors almost entirely on their narrowband and mass market broadband service offerings.[3]

Qwest's treatment of product markets is flatly inconsistent with Commission precedent. The Commission has held that the (1) mass market, (2) small and medium enterprise and (3) large enterprise segments comprise separate markets for telecommunications services. As it explained,

> [w]e find here that the economic characteristics of the mass market, small and medium enterprise, and large enterprise customer classes can be sufficiently different that they constitute major market segments…These customer classes

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[2] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second and Third Report and Order, 12 FCC Rcd 15756, ¶ 28 (1997) ("*LEC Classification Order*") ("Under the 1992 Merger guidelines, market power is determined by delineating both the product and geographic market in which power may be exercised and, then, identifying those firms that are current suppliers and those firms that are potential suppliers in that particular market.").

[3] *See Petition* at 14 (discussing how Cox, a provider of circuit switched phone service and mass market broadband service, Alltel, a provider of residential and business local exchange service, DSL, long distance and wireless services and narrowband CMRS providers all "compete with Qwest in the Omaha MSA").

> generally differ in the kinds of services they purchase, the service quality they expect, the prices they are willing to pay, the levels of revenue they generate, and the costs of delivering them services of the desired quality.[4]

This conclusion is based on the underlying assessment that, as Areeda and Hovenkamp explain, "a significant price increase beyond the competitive level" in either of the business markets would neither induce customers of those services to buy mass market telecommunications services, nor induce providers of such mass market services to provide business services.[5] For example, cable modem and ADSL services are considered to be in the same product market because customers readily switch from one to the other and providers readily increase production in response to significant price increases.[6] This is not the case with ADSL/cable modem service and the more expensive, high capacity, symmetrical services with advanced features demanded by business customers. Price increases in the latter would not induce business customers to purchase ADSL/cable modem service as a substitute, and it would not induce a non-LEC DSL/cable modem provider (that have not and cannot deploy the requisite facilities) to provide business class services as a substitute offering. In other words, if Qwest possesses market power in the provision of business class services, any competition it may face for services in other

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[4] S*ee Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978 ¶ 123 (2003) ("*Triennial Review Order*"), *vacated in part, United States Telecomm. Ass'n v FCC,* 359 F.3d 554 (D.C. Cir. 2004).

[5] 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP AND JOHN SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 561 (2d ed. 2002).

[6] *See Triennial Review Order* ¶ 263 (holding that intermodal competition from cable modem service lessens the need for unbundling of the high frequency portion of the loop for competitive DSL providers). In the AOL-Time Warner Merger Order, the Commission held that DSL and cable modem service were both in the residential high-speed internet access services market. *See Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations of Time Warner, Inc. and America Online, Inc., Transferors to AOL Time Warner, Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, ¶ 65 (2001). Qwest also argued in the Triennial Review proceeding that "retail digital subscriber line (DSL) service and cable modem service generally appear to be substitutes for each other." *See* Reply Comments of Qwest, Declaration of Joseph Farrell, CC Dkt. Nos. 01-338, 96-98, 98-147 ¶ 19 (filed Jul. 17, 2002) ("*Farrell Declaration*").

product markets, for example mass market broadband or narrowband services, would place *little or no constraint* on Qwest's ability to harm competition and consumer welfare in the markets for business class services. Any non-dominance analysis in the area of telecommunications must reflect this basic reality.

It is also not at all clear that Qwest's use of the Omaha metropolitan statistical area ("MSA") as a geographic market is appropriate for all of the product markets at issue. It may well be that this is the appropriate geographic market for the "local exchange services" (*i.e.*, local voice services) market. But this is the not case with regard to business class services since, as explained below, the source of Qwest's market power in those markets is its exclusive control over loops and transport transmission facilities. As the Commission has held, the appropriate geographic market for analyzing incumbent LEC market power over transmission facilities is not an MSA.[7]

In any event, Qwest offers no basis for concluding that it has lost its dominant position in the business class markets in the Omaha MSA. Qwest conveniently neglects to mention that it continues to control bottleneck facilities in this market, a fact that mandates denial of the instant forbearance request. Over 20 years of Commission precedent holds that control over bottleneck facilities is a key indicia of market power.[8] If left unchecked, control over upstream

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[7] *See Triennial Review Order* ¶ 397. Indeed, in a footnote, Qwest even acknowledges that an MSA-based analysis may be improper in many cases. *See Petition* at n. 21 ("Depending on the particular factual circumstances, future forbearance and non-dominance petitions could be brought based upon the competitive characteristics of smaller areas, entire states, or multi-state regions."). As TWTC has recently explained, the Commission's decision to permit pricing flexibility throughout an MSA based on evidence of some competition in the provision of transmission facilities in one part of an MSA (that is, the use of an inappropriate geographic market) has resulted in premature and extremely dangerous deregulation of incumbent LEC special access prices. *Petition of Time Warner Telecom to Reject, or Alternatively, Suspend and Investigate*, Transmittal No. 206 (filed Aug. 23, 2004) ("*TWTC Petition to Reject Qwest Transmittal No. 206*").

[8] *See International Competitive Carrier Policies*, Report and Order, 102 FCC 2d 812, ¶ 48 (1985) (characterizing IMTS providers' control over local exchange facilities as "a classic bottleneck [that] gives these carriers the ability to exclude meaningful competition through discriminatory practices.").

transmission inputs can lead to both price and non-price discrimination.[9] Price discrimination could include raising the price of a necessary input, either on its own or through a price squeeze involving a simultaneous reduction in the dominant carrier's price of a downstream product.[10] Non-price discrimination could include "slow-rolling" of a necessary upstream input or degradation of service.[11] The incentive for discriminatory conduct is greatest where the dominant carrier both supplies the upstream input and competes in the downstream retail market, as Qwest does in the Omaha MSA.[12] Both price and non-price discrimination can be crippling to competition.

The only available means of constraining Qwest's opportunities to act on its incentive to discriminate is to require that it provide competitors access to loops and transport on reasonable and nondiscriminatory terms and conditions. This means, at the very least, retaining (1) unbundling obligations to the extent the impairment test is not met; (2) dominant carrier

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[9] *See COMSAT CORPORATION; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier; Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, ¶ 67 (1998) ("In making a determination about whether a firm is dominant in a relevant market, we analyze whether it can…reduce the quality of a relevant product or service…").

[10] *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, ¶ 56 (1980) ("…we define a dominant carrier as a carrier that possess market power. Market power refers to the control a firm can exercise in setting the price of its output….This may entail setting the price above competitive costs in order to earn supranormal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competition.").

[11] *See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services; Implementation of Section 601(d) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 15668, ¶ 29 (1997) ("Such discrimination can take many forms, such as providing inferior quality interconnection, providing fewer lines (thus reducing the capacity of the competing system to complete calls), delaying the fulfillment of requests for interconnection services, delaying repairs to competitors' interconnection facilities, and providing inferior quality repair services.").

[12] *See LEC Classification Order* n. 205 (noting that BOCs have a greater incentive to discriminate for services in-region, where "a BOC's control over local bottleneck may give it a competitive advantage that it does not have out-of-region, causing the BOC to compete differently in-region than out-of-region.").

regulation for special access loops and transport;[13] (3) collocation requirements so that competitors are able to obtain efficient access to incumbent loops and transport; (4) cost-based interconnection to prevent incumbents from refusing to exchange traffic on reasonable terms and conditions; and (5) network interconnection notification requirements to ensure that competitors can interconnect with incumbent LEC bottleneck transmission facilities on nondiscriminatory terms and conditions. In short, all of the regulatory requirements from which Qwest seeks forbearance are essential to limiting incumbent LEC opportunities to act on their incentives to exploit control over upstream inputs.

There are simply no non-ILEC sources of supply for the vast majority of high capacity loops demanded by all but the smallest business customers. Except for business customer locations with the largest traffic demand, self-deployment of fiber loops is generally not an efficient means of reaching the customer. Contrary to Qwest's assertion that the barriers to competitive entry in the Omaha market are low, (*see Petition* at 16) as the Commission has found, competitors seeking to serve business customers over their own facilities face "steep economic barriers." *Triennial Review Order* ¶ 199. Importantly, "most of the costs of constructing loops are sunk costs." *Id.* ¶ 205. This is true of the huge costs "associated with physically laying the fiber cable." *Id.* ¶ 312. Qwest recognizes that high sunk costs limit competition and can permit unregulated incumbents to charge supra-competitive prices.[14] Entities seeking to deploy fiber loops must overcome the "inability to obtain reasonable and

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[13] As TWTC recently explained, the Commission's existing "dominant" carrier regulation for special access is woefully deficient and must be comprehensively reassessed since it leaves incumbent LECs like Qwest almost entirely free to engage in discrimination. *See TWTC Petition to Reject Qwest Transmittal No. 206.*

[14] *See Farrell Declaration* ¶ 13 (filed Jul. 17, 2004) ("But where sunk costs are very large relative to ongoing costs, an unregulated incumbent might be able to charge a significantly supracompetitive price without attracting entry, if entrants expect that the incumbent's price would be based on short-run cost after entry.").

timely access to the customer's premises both in laying the fiber to the location and getting it to the building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities." *Triennial Review Order* ¶ 303.

With such substantial barriers associated with investing in new fiber loops, it is not surprising that such facilities have only been built to a small portion of business end users. For example, the record in the Triennial Review showed that only "3% to 5% of the nation's commercial office buildings are served by competitor-owned fiber loops." *Id.* n. 856. Therefore, the Commission concluded that "in most areas, competing carriers are unable to self-deploy and have no alternative to the incumbent LEC [fiber loop] facility." *Id.* ¶ 314. Even where competitors deploy some of their own facilities, they are still reliant on ILEC special access. In fact, Qwest has essentially conceded that TWTC and other so-called "facilities based LECs" must rely on loops and transport purchased as special access from incumbent LECs.[15]

Many business customers have several customer locations with differing levels of demand, not all of which (and sometimes none of which) can be served by CLEC self-provisioned loops. For example, it might make economic sense, assuming the CLEC could obtain building rights and overcome other obstacles, to deploy a high capacity loop to serve a customer's headquarters, but to serve the customer's branch offices in the area, the CLEC would remain reliant on incumbent LEC facilities since, as the Commission has noted, there is no business case for building lower capacity loops to individual customers.[16] Since business customers often demand end-to-end solutions, the CLEC would likely be unable to serve the

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[15] *See* Opposition of Bellsouth, Qwest, SBC, USTA, and Verizon to Emergency Motion for Stabilization Order, CC Dkt. Nos. 01-338, 96-98, 98-147 at 10 (filed Jul. 6, 2004).

[16] *See Triennial Review Order* ¶¶ 320-325 (holding that CLECs are impaired without access to DS1 and DS3s).

headquarters without also providing service to the branch offices and therefore, would remain dependant on incumbent LEC loops and transport to address business customers.

Qwest offers no basis for thinking that competitive deployment of loops and transport in Omaha is any different from the rest of the country. None of the "competitors" in the Omaha market cited by Qwest has or can hope to provide an alternative to incumbent LEC loops and transport needed to service the business markets. For example, in its *Petition*, Qwest improperly relies on the evidence of Cox's penetration of the Omaha phone and consumer internet access market to show that Qwest is non-dominant for all telecommunications services in Omaha. Whatever impact Cox's circuit switched telephony and cable modem offerings may have on competition in the mass market, all cable companies, including Cox, are just as reliant as other CLECs on incumbent LEC transmission facilities when they attempt to serve business customers. Cable companies use their own Hybrid Fiber Coaxial ("HFC") networks to provide cable modem service to residential and some small business customers. However, many downtown areas where large businesses are located are outside of cable's network footprint. Moreover, the limited upstream capacity of cable modem service, HFC's shared architecture that can lead to service slowdowns, and the absence of other features demanded by enterprise customers make cable modem service unsuitable for most of the enterprise market.[17] As the Commission has explained, "[the] cable companies have remained focused on the mass market, largely residential service consistent with their historic network footprints, and bundling

[17] *See Triennial Review Order* ¶ 129 ("Large enterprises demand extensive, sophisticated packages of services. Reliability of service is essential to these customers, and they often expect guarantees of service quality. The services they might purchase include an internal voice and data network, local, long distance and international POTS service to one or multiple locations, provisioning and maintenance of a data network such as ATM, frame relay or X.25, and customized billing."). As of June 2002, cable companies "provide[d] fewer than 16,000 coaxial cable connections to medium and large businesses." *Id.* n. 128.

telephone service with cable modem services." *Id.* ¶ 52 (citations omitted). Indeed, even Qwest asserts that cable modem service, like DSL, is a mass market offering.[18]

A survey of Cox's "business services" offering in Omaha indicates that it cannot serve the enterprise market using their own HFC "loops." For example, Cox describes its network as "a local HFC network [] interconnected via a high speed ATM backbone."[19] HFC runs from the node to the customer and delivers bandwidths of "128k symmetrical upstream to 3.2mb downstream in some areas."[20] This indicates that a connection that is both high speed and symmetrical, a necessary level of service for most business customers, is not available via HFC. In addition, like all HFC architectures, Cox's is shared, meaning heavy use by one user can diminish the level of bandwidth available to other users. Cox therefore places bandwidth limitations on its users. Cox Business Services' "Acceptable Use Policies" indicates that the "Customer may not use the Services in a manner that places a disproportionate burden on the network or impairs the Service received by other Customers."[21] Cox has limited cable modem downloads in general to no more than two gigabytes per day.[22] This kind of use restriction is unacceptable to most business customers because they require a predictable and stable level of bandwidth.[23]

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[18] *See* Qwest Reply Comments, CC Dkt. Nos. 01-338, 96-86, 98-147 at 46 (filed Jul. 17, 2002).

[19] http://www.coxbusiness.com/welcome_kit/18888FAQInternet.pdf.

[20] http://www.coxbusiness.com/welcome_kit/18888Facts.pdf.

[21] http://www.coxbusiness.com/AcceptableUsePolicy.pdf.

[22] *See* John Borland, *Putting a Lid on Broadband Use*, NEWS.COM (Sept. 22, 2002), *available at* http://news.com/Putting+a+lid+on+broadband+use/2100-1034_3-5079624.html.

[23] TWTC has previously outlined the inability of Time Warner Cable and Cablevision to address the enterprise market with their limited HFC offering. *See* Reply Comments of TWTC, Dkt. No. 04-242 at 9-10 (filed Aug. 2, 2004). Cox's service is no more robust.

Moreover, there is little reason to believe that cable operators like Cox will enter the business market to any significant degree using self-provisioned fiber loops. To construct fiber loop facilities or even extend their existing HFC network to areas that serve the enterprise market, cable operators must clear the same hurdles that have prevented TWTC and other competitors from building loops to most business locations. Those hurdles include: (1) obtaining access to public rights of way; (2) obtaining access to buildings on reasonable terms and conditions in circumstances in which building owners have no duty and little incentive to provide such access; (3) convincing customers to wait out the delay (lasting anywhere from six to twelve months or even longer) associated with constructing new loops; (4) generating enough revenue from a particular location over a long enough period of time (usually requiring a long-term commitment from the customer) to make loop construction efficient; and (5) ensuring that the service provider can meet the telecommunications needs of the business customer at all of its locations (not just the location at which loop construction is efficient, which businesses increasingly demand from their carriers). There is no reason to believe cable companies would have an easier time surmounting these entry barriers than a wireline CLEC would. Indeed, although Cox does offer DSx and OCn level services, many of these circuits are purchased from Qwest.[24]

Qwest proffers no information as to the extent of fiber deployment by Cox or any other entity in Omaha. Qwest does indicate, however, that Cox's network footprint (and therefore the buildings likely to be even addressable by fiber if the relevant entry barriers were cleared)

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[24] *See* "Cox Private Line" diagram at http://www.coxbusiness.com/privateline.pdf and "Cox Carrier Access" diagram at http://www.coxbusiness.com/carrieraccessservices.pdf. Both diagrams show a separation between the "Cox Network" and the customer loops. A discussion with Cox's Omaha Carrier Access sales representative indicated that many of Cox's special access loops are purchased from Qwest.

encompasses approximately 1/3 or less of the Omaha MSA.[25] Thus, even if Cox were to somehow clear the steep entry barriers associated with self-deployment of loops and transport needed to serve business customers, those facilities would likely serve only a small fraction of the businesses in the MSA.

The other competitors cited by Qwest in Omaha are even less likely to deploy their own loops or ubiquitous transport facilities to serve business customers. Qwest asserts that Alltel and Mcleod are "facilities based" (*Petition* at 9) carriers that have "overbuilt" (*Id.*) Qwest's network and therefore "Qwest's facilities are no longer a competitive bottleneck in the Omaha MSA." *Petition* at 26. Yet Qwest does not (and cannot) point to facilities, beyond switching and a fiber-backbone, deployed by these carriers. In one of the few instances where Qwest cites any sort of business services beyond mass market cable modem service, McleodUSA's "Preferred Advantage Integrated Access," Qwest does not even indicate whether this service is provided over McLeod's own loop facilities. In fact, evidence indicates that McLeod doesn't own loops of its own. By Qwest's own assertion, in 2002 and 2003, McLeod reported all of its "customer platform[s]" as being provisioned through UNEs or resale. *Affidavit* at 18

Nor is there any indication that Alltel, which Qwest asserts serves only "19,184 business lines" as a CLEC *throughout the state*, (*Id.* at 22) is providing business customers with dedicated access or other non-mass market services via is own loop facilities.[26] Although Alltel may indeed own special access circuits in other areas of Nebraska where it is the incumbent, to the

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[25] *Compare Affidavit*, Attach. 2 (showing a map of Cox's "Omaha Metro" network), *with* http://www.census.gov/geo/www/mapGallery/stma99.pdf (showing a map of the Omaha MSA).

[26] A call to their sales office in Omaha indicates that they are reliant on Qwest for a portion of their dedicated access services.

extent Alltel competes at all for enterprise customers in Omaha MSA, it is likely to be in the same position as other CLECs.

Furthermore, any retail competition from CMRS or VoIP providers obviously is irrelevant to the ability of competitive providers to serve business. These services do not have either the bandwidth or features that enterprise customers demand. In any event, as the Commission has found, CMRS carriers are highly dependant upon incumbent LEC special access transport circuits to provide their narrowband retail services.[27]

Finally, the more general information offered by Qwest to support its argument that it is nondominant in all markets in the Omaha MSA does not address its control over loops and transport. For example, Qwest makes much of competitors' self-deployed switches. But the presence of competitive switches (*see Petition* at 13) has absolutely no relevance to whether competitors have self-deployed *transmission facilities* that are the true source of Qwest's market power. Indeed, Qwest's fallback assertion that retail competition is possible through unbundled loops (*see Affidavit* at 6) only underscores the inability of carriers to provision their own special access facilities in Omaha. Qwest's reliance on its unbundling obligations and other legal requirements that have made entry into the Omaha market possible (*see Petition* at 17) is just absurd because Qwest seeks the elimination of just those requirements. Qwest also relies on competitors' market share measured in terms of percentage of access lines served. *See id.* at 18-19. But competition at the retail level in no way indicates that Qwest has lost control over loop

[27] Incumbent LECs are the only carriers able to deliver transport to each CMRS cell tower and "AWS estimates that more than 90 percent of its transport costs go to paying ILECs for special access facilities. Voicestream wireless also has stated that it obtains approximately 96% of its special access transport needs from ILECs." Comments of AT&T Wireless Services, Inc., CC Dkt. Nos. 01-338, 96-98, 98-147 at 11-12 (filed Apr. 5, 2002).

and transport inputs since Qwest has been legally bound to make those inputs available to its competitors in the retail market.

Given Qwest's continued control over loop and transport inputs needed to serve the business markets, broad forbearance from the unbundling, collocation, interconnection, dominant carrier classification and incumbent LEC classification would be disastrous public policy. Eliminating applicable regulation over the upstream inputs would offer Qwest complete freedom to raise its rivals' costs through both price and non-price conduct. Indeed, Qwest has already begun to engage in this conduct. Apparently in response to the uncertain future of its unbundling obligations (this uncertainty limits the constraining effect of unbundling on special access rates), earlier this month, Qwest filed dramatic price increases (in most cases over 20 percent) for, among other things, special access DS1 loops and transport. *See TWTC Petition to Reject Qwest Transmittal No. 206* at 9-10. The fact that Qwest feels comfortable even proposing price increases of this magnitude, which fully apply throughout the Omaha MSA and other MSAs in which it has received Phase II pricing flexibility, indicates that it believes that there are no alternative suppliers of DS1 facilities that could undercut its prices. Moreover, if freed from the remaining regulations applicable to its dominant special access offerings (in other words, if freed from tariff filing obligations) and if freed entirely from its Section 251(c) and 271 duties, Qwest would no doubt engage in even more anticompetitive conduct to the detriment of competition and consumer welfare throughout the Omaha MSA.

III. CONCLUSION

For the reasons described herein, the Commission should deny the Qwest petition.

Respectfully submitted,

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